BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOBBY MONTGOMERY	)	
Claimant	)	
	)	
VS.	)	
	)	
VOLUME SHOE CORPORATION	)	
Self-Insured Respondent	)	Docket No. 198,352
AND	)	
	)	
PAYLESS SHOESOURCE	)	
Respondent	)	Docket No. 1,048,384
	)	
AND	)	
	)	
ZURICH NORTH AMERICAN INS.	)	
Insurance Carrier	)	

ORDER

Respondent, Volume Shoe Corp., a qualified self-insured (Volume), requests review of the June 18, 2010 Preliminary Hearing and Post Award Medical Order by Administrative Law Judge (ALJ) Rebecca Sanders.

APPEARANCES

Jeffrey K. Cooper, of Topeka, Kansas, represents the claimant. Peter J. Chung, of Kansas City, Missouri, represents Volume Shoe Corporation (Volume). James C. Wright, of Topeka, Kansas represents Payless Shoesource and its insurance carrier, Zurich North American Insurance (Payless).

RECORD AND STIPULATIONS

These matters were consolidated for hearing before the ALJ and heard on June 17, 2010. It appears that the parties followed the more related evidentiary rules for a preliminary hearing for both docketed claims. No one objected to this procedure, or asked the ALJ to comply with the statutory framework governing post award medical requests as

provided by K.S.A. 44-510k. Thus, for evidentiary purposes, the post award matter was treated as a preliminary hearing proceeding. The ALJ's findings with respect to both the post award request and the preliminary hearing issue are contained within the Order that is presently on appeal before the Board. The record to be considered includes the pleadings found within the court's file pertaining to Docket No. 198,352[1] as well as the transcript from the June 17, 2010 hearing and the exhibits attached to that transcript.

ISSUES

The ALJ found that claimant's present need for medical treatment is a natural and probable consequence of his original injury sustained while working for Volume.[2] Accordingly, the ALJ ordered Volume to provide the names of 3 qualified physicians for claimant to designate an authorized treating physician.

Volume appeals the ALJ's findings and argues that the ALJ erred and should be reversed. Simply put, Volume contends that claimant's present need for treatment stems from his ongoing work activities for Payless after he settled his original claim and continuing until his last day of work on May 29, 2009. In support of this contention, Volume points to Dr. Koprivica's medical report which suggests that claimant's daily work activities up until May 29, 2009 caused him additional injury. Thus, Payless should be held responsible for claimant's current need for evaluation and treatment. In the alternative, Volume believes an independent medical examination should be requested to ascertain the precise cause of claimant's ongoing complaints.

Payless contends the post award order should be affirmed and that Volume has not appealed any of the issues presented in Docket No. 1,048,384. Thus, Payless believes the Board has no jurisdiction to consider any issue other than the issue of future medical under Docket No. 198,352.

Claimant argues that the ALJ's order should be affirmed as claimant has proven that his current need for medical treatment for his low back is the natural and probable consequence of his original low back injury sustained on February 2, 1994 while employed by Volume.

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[1] This docket was resolved by an Agreed Award and the court file does not contain any deposition testimony.

[2] This injury is encompassed by Docket No. 198,352.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

The issue to be decided in this consolidated preliminary hearing/post award medical matter is rather straightforward and was distilled to a simple statement by the ALJ:

> This is a close case as to whether Claimant has suffered an aggravation or an acceleration of his back injury and thus a new injury or is it a natural and probable consequence of his original injury.[3]

There is no dispute that claimant sustained a low back injury while working for Volume in February 1994. He received treatment, which included surgery, and was ultimately returned to work at accommodated duty in a "rework" position. Claimant settled his workers compensation claim, but his entitlement to additional medical treatment remained open.[4]

According to claimant, his position required bending, twisting grabbing, and handling hundreds of pairs of shoes during a day. Beginning in 2009 claimant began to notice an increase of pain in his back and his legs which he attributed to his work activities, particularly on those days when he had been involved in some heavier activity. At the end of the work day he would often need to lie down. Sometimes he even took a day off, using vacation time, to recover from his symptoms. Claimant denies any specific incident while working, but clearly describes a job that physically took its toll on his body.

Claimant continued working until May 29, 2009 when the plant closed. He ceased working and denies any further accidents. But in September 2009, claimant woke up with severe pain in his back. He sought treatment from Dr. Campbell who identified a slight decrease in the disk space at L4-L5 and recommended an MRI. That treatment has not been provided by either Volume or Payless and as a result, the hearing before the ALJ followed.

In preparation for the hearing, claimant's counsel asked Dr. Koprivica to evaluate claimant and provide any treatment recommendations for his present condition. That evaluation took place on December 28, 2009. Dr. Koprivica opined that -

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[3] ALJ Order (June 18, 2010) at 2.

[4] Hearing Trans. at 8.

> With the data that is available at this point, it is my opinion that it is probable that Mr. Montgomery is suffering from diskogenic pain based on degenerative disk disease at the L4-L5 level that has been permanently aggravated, accelerated and intensified based on the relative risk to which he was exposed with the series of injuries from his bending and lifting activities at Payless Shoe Source through May 29, 2009.[5]

Dr. Koprivica recommended additional testing to define the specific etiology of claimant's back pain in order to direct his care and treatment and he recommended some tests and an MRI to determine what is going on with claimant's back and claimant would like to pursue this as well. He also noted that "the low back pain is likely multi-factorial. His long smoking history as well as his pre-existent surgical history would also contribute to the development of low back pain and need for evaluation and treatment."[6]

The ALJ accurately noted the law which recognizes that every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[7], the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1).

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[8], the Court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

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[5] *Id.*, Cl. Ex. 1 at 9 (Koprivica's Dec. 28, 2009 report).

[6] *Id.*, Cl. Ex. 1 at 10 (Koprivica's Dec. 28, 2009 report).

[7] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[8] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

In *Gillig*[9], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[10], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

While noting *Jackson*, the ALJ went on to note:

> Careful consideration was given to Dr. Koprivica's opinion. However, Claimant's condition did not become so severe that he needed medical care beyond what the Claimant's primary physician could provide until October, 2009 some five months after he stopped working.
>
> Therefore, the Court is awarding medical care due to Claimant's current condition is the natural and probably [sic] consequence of his original injury.[11]

The Board has considered the entire record and like the ALJ, believes this is a close case. Up until May 29, 2009, claimant had obviously been working in an accommodated position but at the same time, suffering from the lasting effects of his 1994 injury. On particularly hard work days, he would experience an increase in back pain and take vacation time to recover. And while Dr. Koprivica's report could be seen as supporting claimant's alternative contention that he sustained a series of repetitive injuries while working for Payless each and every day until May 29, 2009, his report makes it clear that claimant's earlier injury is still a factor in his present need for treatment.

The Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman* and therefore affirms the ALJ's Preliminary Hearing Order And Post Award Order. Claimant's low back condition continued to give rise to pain complaints, particularly

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[9] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[10] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[11] ALJ Order (June 18, 2010) at 2.

when his work activities were more strenuous. He managed these complaints by self limiting or taking vacation time away from work. But in September 2009, his complaints became more pronounced and forced him to seek medical attention. Like the ALJ, the Board concludes that claimant's need for treatment is attributable to her original injury in 1994.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Preliminary Hearing and Post Award Medical Order of Administrative Law Judge Rebecca Sanders dated June 18, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

The undersigned respectfully dissent from the majority's conclusion that claimant proved his current back condition is compensable as a direct and natural consequence of his 1994 injury. After his back surgery in 1995, claimant returned to work with respondent (and its successor corporation) and worked for approximately another 14 years. Although he did not leave work due to his back condition, claimant testified that his subsequent job duties caused a worsening of his condition. This testimony indicates that it was the subsequent work and thus not a direct and natural worsening of the original injury that caused claimant's aggravation. Claimant's testimony is uncontradicted in this regard. Moreover, the only expert medical opinion in the record likewise attributes claimant's aggravation to his subsequent work. As such, Dr. Koprivica's opinion that claimant's prior back injury and pre-existing degenerative disc disease were permanently aggravated and accelerated by his subsequent work is likewise uncontradicted. Although Dr. Koprivica said

that the subsequent work activities were not the only cause of claimant's current symptoms, he opined that the bending and lifting activities at Payless constituted a series of injuries that contributed to the development of the pain and need for additional treatment.

In *Logsdon*[12], the Kansas Court of Appeals focused on the claimant's ongoing symptoms including repeated dislocations of his shoulder in finding the subsequent aggravation to be a direct and natural result of the primary injury. "Logsdon stated that his shoulder improved after surgery but it never got back to full potential and caused him ongoing problems on a monthly basis."[13] "Because Logsdon's prior injury had never fully healed, his aggravation of that same injury by a subsequent non-work-related accident was the natural consequence of his original injury and his post award injury was compensable."[14] In addition, there was expert medical testimony directly relating Logsdon's subsequent injury to the original injury.

Here, however, there is no evidence that Mr. Montgomery sought any additional medical treatment for his back during the 14 years that elapsed between his return to work after his 1995 surgery and his onset of symptoms in 2009 or that his former back injury had never fully healed. Based on the record in this case, claimant has failed to prove that his current need for treatment is compensable under Docket number 198,352.

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BOARD MEMBER

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BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
Peter J. Chung, Attorney for Volume Shoe Corp. - Self-Insured Respondent
James C. Wright, Attorney for Payless Shoesource & Zurich North American Ins.
Rebecca Sanders, Administrative Law Judge

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[12] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P. 3d 430 (2006).

[13] *Id.* at 80.

[14] *Id.* at 85.